

Confrontation Stories: Raleigh on the Mayflower

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Writers and judges have called the Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment in *Crawford v. Washington* many things.¹ But the movie version should be called *Sir Walter Raleigh Came Over on the Mayflower and Other Stories My Evidence Teacher Taught Me*.² Justice Scalia's majority opinion tells a version of the history of the Confrontation Clause that would do Hollywood proud. But unless they wish to operate on the same level of "truth" as "reality TV," lawyers should know better.

The conventional history of the right of confrontation, as embraced by the *Crawford* majority, goes something like this:³ the right of confrontation was created by common law judges seeking to preserve the English tradition of liberty in cases of the Tudor oppression of the aristocracy; our ancestors brought this common law right with them when they came to the New World and deployed it against imperial persecution in inquisitorial courts. When drafting the Bill of Rights, James Madison wrote this common law right to cross-examine witnesses into the Sixth Amendment as a separate right of "confrontation."

Unfortunately, this romantic myth conflicts with some little-known facts—notably that the English common law has never recognized a right of confrontation.⁴

Why should we care whether the Supreme Court uses spurious history to justify its decisions? First, some writers and courts actually use the Supreme Court's history to decide what powers the right of confrontation gives criminal defendants.⁵ While we can debate whether courts should use history this way, presumably few would defend the misuse of history to deny defendants their rights. Second, the right of confrontation's true history supports some parts of the

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¹ See 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE EVIDENCE* § 6371.2 (Pocket Pt. 2005). Readers seeking documentation may find it by logging on to Westlaw, entering "FPF" and the relevant section number in "Find," then clicking "go."

² *Id.* The Court apparently got its CliffsNotes version of history from a brief filed by a group of law professors. Motion for Leave to File and Brief of Amici Curiae Law Professors Sherman J. Clark et al., *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958.

³ *Crawford v. Washington*, 541 U.S. 36, 44-49 (2004).

⁴ ANDREW L.T. CHOO, *HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS* 181 (1996).

⁵ See, e.g., *Hammon v. State*, 809 N.E.2d 945, 951-52 (Ind. Ct. App. 2004) (rejecting confrontation claim because police interrogation was dissimilar to "an inquiry before King James I's Privy Council"). Cf. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 558 (2005) (comparing police interrogation to preliminary hearing before English Justice of the Peace).

Crawford opinion and undermines other parts. Third, the true story provides a far more complex and interesting tale than the conventional “history” embraced by the *Crawford* majority, albeit a tale that cannot provide an answer to all contemporary Confrontation Clause questions.

But first, a bit of background to refresh the reader’s recollection. True history, as we shall see, suggests that the Founders viewed the Sixth Amendment holistically; that is, they saw the enumerated rights as dots that had to be connected to provide a right to an adversary system of criminal justice that was much more than the sum of the specified parts. For example, the Founders said nothing about “trial by newspaper,” but viewed holistically the Sixth Amendment incorporates “the blank pad rule” that requires courts to make sure that criminal convictions rest only on evidence produced in open court.⁶

The Supreme Court did not construe the Confrontation Clause until very late in the Nineteenth Century.⁷ Ignorant of the true history, the Supreme Court’s confrontation jurisprudence prior to 1965 tended to see confrontation as a narrow right to cross-examine available witnesses. So long as the issue only arose in federal cases, the Court seldom had to confront a major problem with this analysis; namely, the connection, if any, between the right of confrontation and the common law hearsay rule, which was also rationalized as resting on a need for cross-examination.⁸ But when the Court made the federal right of confrontation binding on the states by “incorporating” it into the Due Process Clause of the Fourteenth Amendment,⁹ it loosed the demons of Hell. For the next quarter of a century, the Court struggled to avoid “fusion”—that is, making confrontation simply a constitutional version of the hearsay rule. Finally in 1980 in *Ohio v. Roberts*, the Court hit on a kind of fusion it thought states could live with.¹⁰

After another quarter of a century tweaking *Roberts*, some members of the Court became unhappy with fusion and expressed interest in rethinking the Court’s confrontation jurisprudence.¹¹ In *Crawford*, those judges attempted such a fresh start. Basically, *Crawford* suggests a dual system of confrontation. One class of hearsay that the Court calls “testimonial statements” fall under a fairly severe regime—inadmissible unless the declarant is unavailable and the defendant had a

⁶ For an example of such a holistic reading, see *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

⁷ 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE EVIDENCE* § 6356, at 212 (2000).

⁸ Readers familiar with the Court’s recent decisions know that the Court tried to root both rules in a more fundamental concern about the “reliability” of the evidence used to convict. History provides little support for this reading and *Crawford* seems to reject it—but that question lies beyond the scope of this essay.

⁹ *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

¹⁰ 448 U.S. 56, 66 (1980). Without going into doctrinal niceties, suffice it to say that the Court held that well-established hearsay exceptions were presumptively constitutional. Other hearsay from available declarants had to possess some “indicia of reliability” to pass constitutional muster.

¹¹ WRIGHT & GRAHAM, *supra* note 7, § 6370, at 862–63.

prior chance to cross-examine the declarant. All other hearsay statements remain subject to the *Roberts* fusion regime.¹²

This essay argues that history lends some support to the *Crawford* dual system of confrontation; in 1164, long before the hearsay rule emerged, the Constitutions of Clarendon drew what would prove to be a recurrent distinction between hearsay declarants when it provided that “[l]aymen are not to be accused save by proper and legal *accusers* and *witnesses* in the presence of the bishop.”¹³ But, on the other hand, history undermines the Court’s long-standing view that confrontation requires only cross-examination. Instead, history suggests that confrontation comprises one small part of the “holistic Sixth Amendment” that the Founders called “trial by jury.”¹⁴

I. “FOREIGN” ANTECEDENTS

Justice Scalia’s opinion for the Court refers to European and colonial history in support of its conclusions. Given Justice Scalia’s criticism of other members of the Court for relying on “foreign precedents,”¹⁵ his use of English antecedents in his *Crawford* opinion seems surprising. Moreover, anachronism plagues his claim that confrontation “dates back to Roman times.” While Roman law did recognize a procedure bearing that name, it was not a trial device but an investigative tool resembling a modern police lineup.¹⁶ The majority opinion may similarly mislead when it cites Blackstone to support the claim that “the common law” was the Founders’ “immediate source” for the Sixth Amendment right.¹⁷ Blackstone supports the holistic right recognized by the Founders, not the crabbed right of cross-examination embraced in the Court’s modern decisions.

The Scalia opinion rests on sounder ground when it claims that the colonists carried with them to the New World a resentment of the English use of Roman law procedures. But Scalia, perhaps understandably, overlooks a more potent user of the inquisitorial system—the church courts.¹⁸ Under the so-called “*inquisitio*” the ecclesiastical judge combined the roles of accuser, prosecutor, judge, witness, and jury. While ordinary folk may have cared little and known less about aristocratic treason trials, they were quite familiar with the church courts that prosecuted sin

¹² See WRIGHT & GRAHAM, *supra* note 1, § 6371.2.

¹³ 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 6342, at 210–11 (2000) (citing LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 45 (1969) (emphasis added)).

¹⁴ *Id.* § 6348, at 780.

¹⁵ Anne Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, WASH. POST, Apr. 3, 2003, at A7.

¹⁶ WRIGHT & GRAHAM, *supra* note 13, § 6342, at 199.

¹⁷ The influence of Blackstone is described in WRIGHT & GRAHAM, *supra* note 13, § 6345, at 528–29.

¹⁸ See *id.* § 6342, at 200.

and heresy. When the Sacrament Act of 1547 gave Justices of the Peace power to enforce sumptuary laws, the statute enjoined them to "examine the *accusers* . . . and other *witnesses*" to determine "how many other than the accusers have knowledge" of the crime.¹⁹ The majority opinion correctly notes that many victims of these inquisitorial proceedings demanded to face their "accusers," but it erroneously supposes that "accuser" meant any "witness against" the prisoner, ignorant of the historical distinction between the "accuser" and ordinary "witnesses."

In 1652, Gerard Winstanley, a leading figure among a group of communist Christians popularly known as "the Levellers," proposed a list of sixty-two laws for a Christian Commonwealth that included two adjacent provisions that illustrate the distinction. The first provided that "[n]o accusation shall be taken against any man, unless it be proved by two or three witnesses." The second added that "[t]he accuser and accused shall always appear face to face before any Officer, that both sides may be heard." Later Winstanley defines "accusation" as "when one man complains of another to an Officer; all other accusations the Law takes no notice of."²⁰

In a portion of his trial not quoted in the *Crawford* opinion, Raleigh also distinguishes between accusers and witnesses:

For all that is said to the contrary, you see my only accuser is the Lord Cobham, who, with tears, hath lamented his false accusing me, and repented of it as if it had been an horrible murder . . . [after quoting St. Augustine on judging others as you would be judged, Raleigh continues] if you would be content all this should befall you upon a trial by suspicions and presumptions,—upon an accusation not subscribed by your accuser,—without the open testimony of a single witness, then so judge me as you would yourselves be judged.²¹

The *Crawford* opinion quotes Raleigh's demand for confrontation with his accuser without noting that he insists on trial by jury, rather than being tried by the procedures of "the Spanish Inquisition."²² In other words, he wants more than cross-examination.

John Lilburne, a defendant more likely to be known to those who would go to America, was an accomplished self-publicist who managed to fall afoul of both monarchist and Puritan rulers.²³ When brought before Star Chamber he demanded confrontation with his accusers but linked it to the nascent privilege against self-

¹⁹ *Id.* § 6342, at 226 (citing Sacrament Act, 1547, 1 Edw. 7, c. 1, § 2 (emphasis added)).

²⁰ WRIGHT & GRAHAM, *supra* note 13, § 6343, at 309 (citing GERARD WINSTANLEY, *THE LAW OF FREEDOM IN A PLATFORM* 138 (Kenny ed. 1973)).

²¹ *Id.* § 6342, at 268 (citing JARDINE, 1 *HISTORICAL CRIMINAL TRIALS* 441–42, 449 (1832)).

²² *Id.* § 6342, at 262–63.

²³ *Id.* § 6343, at 311–17.

incrimination and a right to a public trial: "produce them in the face of the open court, that we may see what they accuse me of; and I am ready here to answer for myself."²⁴ Later, while standing in the pillory after having been whipped a hundred strokes, Lilburne harangued the crowd about the injustice of his trial but appealed to a higher authority than the common law:

[I]t is absolutely against the law of God; for that law requires no man to accuse himself; but if any thing be laid to his charge, there must come two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, "Why ask you me? Go to them that heard me."²⁵

In a later pamphlet account of his trial, Lilburne again linked confrontation with self-incrimination, but more modestly compared himself to Paul before the Roman Governor.²⁶

Confrontation also appears in popular culture of the time. For example, Shakespeare has several references to confrontation; the best known lines come from the opening scene of *Richard II* where the King, after satisfying himself that the accusation against the Duke of Norfolk was made in good faith, orders "[t]hen call them to our presence; face to face, [a]nd frowning brow to brow, ourselves will hear the accuser and the accused freely speak."²⁷ Other passages of aristocratic confrontation appear in another historical play.²⁸ But the passage most likely to appeal to the groundlings occurs in a parody preliminary examination in the comedy *Much Ado About Nothing*. As Dogberry, the blundering constable deputed to run the hearing, tries to browbeat a confession out of the accused, the sexton corrects him with "[m]aster constable, you go not the way to examine: you must call forth the watch that are their accusers."²⁹

II. CONFRONTATION IN AMERICA

Though the colonists did not carry over any common law right of confrontation to the New World, they did carry with them two books that played a key role in the creation of that right on this side of the Atlantic. The most popular

²⁴ John Lilburn, *The Trial of John Lilburn and John Wharton (1637)*, in 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH CRIMES AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT (1809).

²⁵ *Id.* at 1332.

²⁶ WRIGHT & GRAHAM, *supra* note 13, § 6342, at 241.

²⁷ *Id.* § 6342, at 255 (citing WILLIAM SHAKESPEARE, *RICHARD THE SECOND*, act 1, sc. 1).

²⁸ *Id.* § 6342, at 255–57.

²⁹ *Id.* § 6342, at 257–58 (citing WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 4, sc. 2).

book in colonial homes was the *Geneva Bible*, published as its name suggests by exiles from the Marian persecutions.³⁰ The *Geneva Bible* carried marginal notes that, among other things, tried to show the contemporary political significance of Biblical passages. King James so feared the *Geneva Bible* that he ordered preparation of the "authorized version" of the Bible that later bore his name—but bore no marginal notes of political commentary.

In the best known Biblical passage on confrontation, Paul stood accused of sedition so a Roman tribune sent him to the Roman governor and "commanded his accusers to speak before thee [the governor] the things they had against him." At the hearing, Paul challenged his accusers who had only hearsay knowledge to prove the charges, pointing out that witnesses who had personal knowledge "ought to have been present before thee, and accuse me, if they had ought against me." At this point, a marginal note underlines the dangers of hearsay: "For his accusers spake but upon a false report, which these bellowers of Satan had blown abroad, and durst not them selves appear." Two years later when Festus became governor he wrote his superior that Paul's enemies were still demanding his punishment, adding "[t]o whom I answered, that it is not the maner of the Romaines for favor to deliver anie man to the death before that he which is accused, have the accusers before him, and have place to defend himself, concerning the crime."³¹

Though Festus may refer to the Roman form of confrontation, the translator blurs the distinction so as to favor a broader reading by dissenters. For example, John Lilburne used this passage expansively to condemn Star Chamber for treating him worse than the "Pagans and Heathen Romans."³²

Confrontation also figures in the noncanonical tale of Jesus and the anonymous woman allegedly caught in an act of adultery. When his enemies brought her before Jesus to force him to choose between his teachings and the Mosaic law, Jesus famously replied, "Let him that is among you without sinne, cast the first stone at her." The *Geneva Bible* explains that in casting the first stones, witnesses "declared that they testified trueth." So challenged, her accusers slunk off one by one, leaving Jesus alone with the woman. The *Geneva Bible* continues: "When Jesus had lift up him self againe, and sawe no man, but the woman, he said unto her, Woman, where are those thine accusers? Hathe no man condemned thee? She said, No man, Lord. And Jesus said, Nether do I condemne thee: go and sinne no more."³³

³⁰ *Id.* § 6342, at 234–36.

³¹ *Id.* § 6342, at 238–40 (citing *Acts* 25:16).

³² See *id.* § 6342, at 240–41 (citing JOHN LILBURNE, A WORKE OF THE BEAST, OR A RELATION OF A MOST UNCHRISTIAN CENSURE (1638) (reprinted in WILLIAM HALLER, 2 TRACTS ON LIBERTY IN THE PURITAN REVOLUTION 1638–1647, at 9 (William Haller ed. 1934) (1885))).

³³ *Id.* § 6342, at 242 (citing *John* 8:9).

A manual for justices of the peace popular in the colonies cites this passage for the ironic proposition that “no man is to be condemned [sic] without an accuser.”³⁴

The second book of confrontation stories that the colonists carried to the New World was *Foxe's Book of Martyrs*—a compendium of religious persecution in England and elsewhere.³⁵ Foxe decried the Spanish Inquisition because:

[W]hat is done in the process no person knoweth, but only the holy fathers and the tormentors, which are sworn to execute the torments. All is done in secret . . . for all the proceedings of that execrable inquisition are open to no man, but all is done in hugger-mugger and close corners, by ambages, by covert ways, and secret counsels. The accuser is secret, the crime secret, the witness secret, whatsoever is done is secret, and neither is the poor prisoner ever advertised of any thing. If he can guess who accused him, whereof and wherefore, he may be pardoned peradventure of his life: but this is very seldom . . .³⁶

The distinction between “accusers” and “witnesses” runs throughout Foxe’s volumes—the former often equated with “informers” or hearsay declarants. For example, in 1415 John Hus challenged his accusers:

[S]ince that you, which do never cease to slander and backbite me with your words, do understand and know these things, come forth openly before the face and presence of the lord archbishop, and with an open mouth declare and show forth what false doctrine or other things ye have heard me teach, contrary to the catholic faith.³⁷

According to Foxe, long before Sir Walter Raleigh ordinary English men and women were demanding production of an accuser, eventually linking this to the inchoate privilege against self-incrimination.

Since they could not invoke the common law, the dissenters fell back on the Bible. For example, in 1530 they wrote a letter to one of their “brethren” in the Tower, warning him against informers and adding that:

[W]e must not suffer the wrong, but boldly reprove them that sit as righteous judges, and do contrary to righteousness. Therefore, according both to God’s law and man’s, ye be not bound to make answer in any

³⁴ *Id.* § 6370, at 242 (citing MICHAEL DALTON, *THE COUNTRY JUSTICE* 379 (1746)).

³⁵ *See id.* § 6342, at 248, 258.

³⁶ WRIGHT & GRAHAM, *supra* note 1, § 6342.1 (citing JOHN FOXE, 2 *FOX’S BOOK OF MARTYRS: THE ACTS AND MONUMENTS OF THE CHURCH* 174–75 (Cumming ed. 1851)).

³⁷ *Id.* § 6342.1 (citing JOHN FOXE, 1 *FOX’S BOOK OF MARTYRS: THE ACTS AND MONUMENTS OF THE CHURCH* 839 (Cumming ed. 1851)).

cause, till your accusers come before you; which if you require, and thereon do stick, the false brethren shall be known, to the great comfort of those that now stand in doubt whom they may trust; and it shall also be a mean that they shall not craftily, by questions, take you in snares. And that you may do this lawfully, in Acts xx. it is written, It is not the manner of the Romans to deliver any man that he should perish, before that he which is accused have his accusers before him, and have licence to answer for himself, as pertaining to the crime whereof he is accused.³⁸

The martyrs quoted by Foxe drew on a broad range of procedural and substantive policies ranging from religious freedom to separation of functions—one dissenter even claimed that without an accuser distinct from those who would judge the accusation “there is no due form of process in the judgment.”³⁹

III. THE REVOLUTIONARY IMPETUS

What the colonists brought with them, then, was not an English right of confrontation, but the English and Continental intellectual seeds that would blossom into the right of confrontation when fertilized by inquisitorial abuses in the colonies. Justice Scalia’s majority opinion in *Crawford* correctly notes the revolutionary roots of the Sixth Amendment but his focus on the narrow cross-examination model of “confrontation” does not do justice to the impact of the inquisitorial vice-admiralty courts.⁴⁰ John Adams, who later drafted the Massachusetts confrontation clause, defended John Hancock in vice-admiralty court on a charge of smuggling and when the prosecution invoked common law evidence rules, Adams argued to the court:

[T]hat if We are to be governed by the Rules of the common law We ought to adopt it as a whole and summon a jury and be tried by Magna Charta. Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face to Face.⁴¹

George Mason, who would draft the Virginia confrontation clause, also thought trial by jury captured a bundle of rights denied in vice-admiralty courts. In a letter to a group of English merchants explaining why repeal of the Stamp Act did not suffice to resolve colonial grievances, Mason wrote:

³⁸ *Id.* § 6342.1 (citing JOHN FOXE, 1 *FOX’S BOOK OF MARTYRS: THE ACTS AND MONUMENTS OF THE CHURCH* 350–51 (Cumming ed. 1851)).

³⁹ *Id.* § 6342.1 (citing JOHN FOXE, 1 *FOX’S BOOK OF MARTYRS: THE ACTS AND MONUMENTS OF THE CHURCH* 206 (Cumming ed. 1851)).

⁴⁰ See WRIGHT & GRAHAM, *supra* note 13, § 6345, at 484–85.

⁴¹ *Id.* § 6345, at 521–22 (citing JOHN L. ADAMS, 2 *LEGAL PAPERS OF JOHN ADAMS* 185 (L. Kinvin Wroth & Hiller B. Zobel eds., Belknap Press 1965)).

To make an odious distinction between us and our fellow-subjects residing in Great Britain, by depriving us of the ancient trial, by a jury of our equals, and substituting in its place an arbitrary civil-law court—to put it in the power of every sycophant and informer (“the most mischievous, wicked, abandoned and profligate race,” says an eminent writer upon British politics, “that ever God permitted to plague mankind”) to drag a freeman a thousand miles from his own country (whereby he may be deprived of the benefit of evidence) to defend his property before a judge, who, from the nature of his office, is a creature of the ministry, liable to be displaced at their pleasure, whose interest it is to encourage informers, as his income may in great measure depend upon his condemnations, and to give such judge a power of excluding the most innocent man thus treated, from any remedy (even the recovery of his costs) by only certifying that in his opinion there was a probable cause of complaint . . . [are evils that] did not altogether depend upon the stamp act, and therefore are not repealed with it.⁴²

Ordinary citizens got regular reports of the proceedings against Hancock in the revolutionary periodical, *A Journal of The Times*, which compared the vice-admiralty courts unfavorably with Star Chamber.⁴³ Similarly, when Henry Laurens of South Carolina, who would later serve as President of the Continental Congress, became embroiled in a vice-admiralty proceeding, he wrote a widely circulated pamphlet attacking those courts in which he used Blackstone’s famous encomium on trial by jury to attack the vice-admiralty denial of confrontation.⁴⁴

But colonial grievances extended well beyond vice-admiralty courts and inquisitorial proceedings. When Pennsylvania tried to move the trial of a group of backwoodsmen, who had slaughtered a group of Conestogas, from the frontier to Philadelphia, a petition against this procedure argued it would

deprive British Subjects of their known Privileges . . . and to contradict the well-known Laws of the British Nation in a point whereon Life, Liberty and security essentially depend, namely, that of being tried by their equals in the neighborhood where their own, their Accusers’ and the Witnesses’ Character and Credit with the Circumstances of the Fact, are best known.⁴⁵

⁴² *Id.* § 6345, at 503–04 (citing EDMUND SEARS MORGAN, PROLOGUE TO REVOLUTION 159–60 (Edmund S. Morgan ed., 1973) (1959)).

⁴³ *Id.* § 6345, at 524–25 (citing O. M. DICKERSON, BOSTON UNDER MILITARY RULE 31 (1979)).

⁴⁴ *Id.* § 6345, at 515–16 (citing *A Remonstrance of the Distressed and Bleeding Frontier Inhabitants of the Province of Pennsylvania (1764)*, in 1 DOCUMENTS OF AMERICAN HISTORY 50 (Henry Steele Commager ed., 1968)).

⁴⁵ *Id.* § 6345, at 492.

Notice that this passage distinguishes between “accusers” and “witnesses” and links trial by jury to what would become the vicinage clause of the Sixth Amendment. Similarly, a pamphlet attacking a New York statute declaring Ethan Allan and the Green Mountain Boys guilty of riot closed with this bit of doggerel:

When Caesar reigned King at Rome
 Saint Paul was sent to hear his doom,
 But Roman Law in a criminal Case,
 Must have the Accuser Face to Face,
 Or Caesar gives a flat Denial—
 But here’s a Law made now of late,
 Which destines Men to awful Fate
 And Hangs and Damns without a Trial⁴⁶

In other words, failure to confront means more than denial of cross-examination—it means a denial of trial by jury.

On the eve of the Revolution, the colonists began invoking Blackstone’s recently published third volume. That volume treated confrontation as an incident of trial by jury.⁴⁷ In *Address to the Inhabitants of Quebec* in 1774, the Continental Congress included in the list of rights they had been denied:

The next great right is that of trial by jury. This provides, that neither life, liberty, nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full inquiry, face to face, in open court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him.⁴⁸

Passages such as this give new meaning to Jefferson’s complaint in the Declaration of Independence that the English government had been “depriving us, in many cases, of the benefits of trial by jury.”⁴⁹

IV. THE SIXTH AMENDMENT

When the colonies became independent states, they wrote their own declarations of the rights they had demanded during the revolutionary struggle. In

⁴⁶ *Id.* § 6345, at 561.

⁴⁷ *Id.* § 6345, at 432.

⁴⁸ *Id.* § 6345, at 561 (citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 221 (Bernard Schwartz ed., 1971)).

⁴⁹ *Id.* § 6345, at 558 (citing *The Declaration of Independence*, in BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 252–53 (Bernard Schwartz ed., 1971)).

May, 1776, in his room in Raleigh's Tavern, George Mason penned the draft of the first confrontation clause. Included in the incidents of trial by jury was a right "to be confronted with the Accusers or Witnesses"—later changed to "Accusers and Witnesses."⁵⁰ Jefferson also saw confrontation as an incident of trial by jury but his draft provided that cases "shall be tried by a jury upon evidence given viva voce, in open court."⁵¹

Seven other states put the right of confrontation into their constitutions but only Delaware followed the Virginia model. North Carolina gave the accused the right "to confront the accusers and witnesses with other testimony." Pennsylvania, Vermont and Maryland said "to be confronted with the witnesses" or "the witnesses against him." Massachusetts and New Hampshire gave a right "to meet the witnesses against him face to face." But nothing in the historical record suggests that the drafters thought these different words described a different right—or one limited to cross-examination.

As Justice Scalia notes in his *Crawford* opinion, the opponents of the Constitution made much of the drafters' failure to include a bill of rights that spelled out the incidents of trial by jury in criminal cases—such as the right of confrontation.⁵² When Madison sat down to redeem the Federalist promise of amendments to cure this defect, he had more than 200 amendments proposed by state ratifying conventions to sift through—including several different forms of a confrontation clause. Madison copied the language from a New York proposal: "to be confronted with his accusers and the witnesses against him."⁵³ In addition, he would have amended the jury trial provision in Article III to include vicinage, unanimity, "and other accustomed requisites."⁵⁴

When the House referred Madison's draft to a select committee that included Madison and representatives of each of the other states, that body changed the confrontation provision to its present form; that is, it dropped the reference to accusers so the clause read "to be confronted with the witnesses against him." But nothing in the legislative history suggests that the committee intended to alter the meaning of Madison's draft.⁵⁵ When the House version went to the Senate, that body objected to the vicinage provision but approved the Confrontation Clause as written. However, a conference committee decided to take the provisions

⁵⁰ *Id.* § 6346, at 580–81.

⁵¹ *Id.* at § 6346, at 581 (citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 243 (Bernard Schwartz ed., 1971)).

⁵² The Scalia opinion contains two quotations showing that the opponents viewed confrontation as simply one of several incidents of jury trials not spelled out in the proposed Constitution, one of which links confrontation to trial in the vicinage. *Crawford v. Washington*, 541 U.S. 36, 48–49 (2004). But the majority still treats confrontation as a simple right to cross-examine.

⁵³ WRIGHT & GRAHAM, *supra* note 13, § 6347, at 760–61.

⁵⁴ *Id.* § 6347, at 762.

⁵⁵ *Id.* § 6347, at 764.

governing jury trial, including the right of confrontation, out of the body of the Constitution and combine them in a separate amendment.⁵⁶

V. SUMMING UP

Even this brief sampling of the evidence available in the historical record should suffice to show the flaws in the conventional history. First, the right of confrontation is an American innovation, not an import from England. Second, the Founders wanted a right to confront not only the “witnesses” who appeared at trial but the “accusers” who lurked in the shadows. Finally, to “confront” an accuser meant more than cross-examination but a right to a trial of the accusation by procedures that were adversarial rather than inquisitorial. In short, the Sixth Amendment amounts to more than a bundle of disparate rights; it incorporates a holistic vision of a fair trial.

However, history does not provide clear answers to most contemporary confrontation questions. The consistent distinction drawn between “accusers” and “witnesses” strongly suggests that the drafters of the Confrontation Clause meant to provide a right to confront not only the witnesses called by the prosecution but also hearsay declarants. But because the hearsay rule was ill-defined in the late 18th Century, history cannot tell us whether the Founders would have approved a dual system of confrontation that treated “accusers” and “witnesses” differently.

Instead of providing answers, all history can provide is some guidance in asking the right questions. Rather than trying to decide whether a person making a 911 call is more like Lord Cobham or “the Portuguese gentleman,”⁵⁷ courts and writers need to think about the modern meaning of an accusatorial system of criminal justice incorporating the values that moved the Founders in drafting the Fourth, Fifth, and Sixth Amendments. For example, some states now allow the prosecution to use hearsay reports of the results of DNA analysis rather than calling the person from the crime lab who ran the test. History cannot tell us whether the Founders intended to allow confrontation of chemists, but it provides fruitful analogies that enrich our analysis. Given the way in which the hatred of the theologians who provided the doctrinal basis for heresy prosecutions became transformed into colonial objections to customs informers, we can justly suppose that the Founders would treat the person who says “the DNA we found on the victim came from the defendant” as an “accuser” who must confront the defendant with that opinion.

But we must still ask what it means to “confront” the chemist. Is it enough that the chemist appears at the preliminary hearing and could have been cross-examined? Since modern criminal pleadings do not provide the detail of a common law indictment, does the Fifth Amendment suggest that confrontation at

⁵⁶ *Id.* § 6347, at 766.

⁵⁷ “The Portuguese gentlemen” was the declarant of a hearsay statement offered against Raleigh. *Id.* § 6342, at 267–68.

the preliminary hearing does not suffice unless the defense is provided with the chemist's report prior to the preliminary hearing? Or does the analogy to the right to counsel suggest that preliminary hearing confrontation suffices if the state provides the defense with the funds and materials to run its own DNA testing prior to trial? Given that courts have interpreted the Fourth and Fifth Amendments to allow the prosecution to commandeer the defendant's own DNA to accuse him of the crime, doesn't this require a concomitant strengthening of the right of confrontation to prevent prosecutorial abuse of these enhanced powers?

In short, history suggests that the *Crawford* court may finally be on the right track, but it has a long way to go before confrontation becomes "the little engine that could." A more sophisticated history is no "procedural guarantee of trustworthiness," but it might provide more help than "Sir Walter Raleigh on the Mayflower."

